NO. 87-805

Supreme Court, U.S.
FILED
DEC 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAMES N. FLEMING,
Petitioner,

v.

M. E. GIBSON, JR., et al,.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

James C. Roberts*
Russell V. Palmore, Jr.
George A. Somerville
MAYS & VALENTINE
Post Office Box 1122
Richmond, Virginia 23208
(804) 697-1200

Albert M. Orgain, IV
Henry M. Massie, Jr.
Robert B. Delano, Jr.
SANDS, ANDERSON,
MARKS & MILLER
The Ross Building, Suite 1440
801 East Main Street
Richmond, Virginia 23219
(804) 648-1636

Mary Sue Terry
Attorney General of Virginia

Guy W. Horsley, Jr.
Senior Assistant Attorney General

OFFICE OF THE
ATTORNEY GENERAL
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-2071

**Counsel of Record for Respondents*

Appellate Printing Services • Heritage Bldg. • 10th & Main • Richmond, VA 23219 • (804) 643-7789

TABLE OF CONTENTS

	Page
Table of Citations	ii
Opinions and Judgments Below	1
Statement of the Case	2
Summary of Argument	4
Argument	4
Conclusion	6

TABLE OF CITATIONS

CASES

Page

Augustine v. Doe, 740 F.2d 322 (5th Cir. 1984) 4, 5

Dennis v. Sparks, 449 U.S. 24 (1980) 3

Fleming v. Gibson, Civil Action No. 86-0150-R (E.D. Va.) 1

Fleming v. Gibson, No. 86-1717 (4th Cir. 1987) *(per curiam)* 2

Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981) 2

Fleming v. Moore, Record No. 850622 (Va.), *cert. denied*, ____ U.S. ____, No. 85-2168 (1986) 3

Fleming v. Moore, ____ U.S. ____, No. 85-2168 3

The Gazette, Inc. v. Harris, 229 Va. 1, 325 S.E.2d 713, *cert. denied*, 472 U.S. 1032, 473 U.S. 905 (1985) 2

Hudson v. Palmer, 468 U.S. 517 (1984) 4, 5

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) ... 4, 5, 6

Parratt v. Taylor, 451 U.S. 527 (1981) 2, 4, 5, 6

Stana v. School District, 775 F.2d 122 (3rd Cir. 1985) 4

STATUTES

42 U.S.C. § 1981 3

42 U.S.C. § 1983 ..... 1, 3, 6

42 U.S.C. § 1985 3

42 U.S.C. § 1986 3

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(b)(6) 1

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 21.5 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NO. 87-805

JAMES N. FLEMING,
Petitioner,

v.

M. E. GIBSON, JR., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS AND JUDGMENTS BELOW

By Order dated July 16, 1986, accompanied by a Memorandum opinion, the United States District Court for the Eastern District of Virginia (Hon. Robert R. Merhige, Jr.) partially granted the defendants' motions to dismiss under Rule 12(b)(6), Fed.R.Civ.P. *Fleming v. Gibson*, Civil Action No. 86-0150-R. The Order and opinion are printed in the Appendix to the Petition for Certiorari (App.) at A-37, A-39. That Order dismissed the § 1983 Due Process claim that is pressed in the Petition for Certiorari.

By Order dated November 13, 1986, accompanied by a second Memorandum opinion, the District Court reaffirmed its earlier decision partially granting defendants' motions to dismiss, granted summary judgment in favor of defendants on several of plaintiff's claims, and granted motions to dismiss all remaining claims. *See* App. at A-4, A-6.

The District Court's final judgment was affirmed by the United States Court of Appeals for the Fourth Circuit on August 14, 1987, on the reasoning of the November 13, 1986, decision of the District Court. *Fleming v. Gibson*, No. 86-1717 (*per curiam*). *See* App. at A-1. By Order dated September 21, 1987, the Court of Appeals denied Petitioner's petition for rehearing or rehearing en banc. (A copy of that Order is attached as an Appendix to this Brief.)

None of the opinions is published in any reporter.

STATEMENT OF THE CASE

The question presented relates to application of the rule announced in *Parratt v. Taylor*, 451 U.S. 527 (1981), and its progeny, that a random, unauthorized property deprivation by state actors does not constitute a Due Process violation if a pre-deprivation hearing would be impracticable and an adequate post-deprivation remedy is available.

The case has its genesis in a land use controversy in Albemarle County, Virginia, in the mid-1970's. Petitioner James N. Fleming sought local government approvals to develop a new residential area adjacent to respondent Moore's property. Mr. Moore and many others opposed Mr. Fleming's proposal. Mr. Fleming published an advertisement in two local newspapers that accused Mr. Moore of "RACISM." Mr. Moore sued Mr. Fleming for libel, represented by respondent Albro (and others). Mr. Moore twice obtained judgments against Mr. Fleming in the Albemarle County Circuit Court, and Mr. Fleming twice appealed.[1] Following the second appeal, Mr. Moore agreed in the

---

[1] Mr. Fleming's two appeals are reported in *Fleming v. Moore*, 221 Va. 884, 275 S.E.2d 632 (1981), and *sub nom. The Gazette, Inc. v. Harris*, 229 Va. 1, 325 S.E.2d 713, *cert. denied*, 472 U.S. 1032, 473 U.S. 905 (1985).

Circuit Court to a remittitur that reduced his judgment to $233,333.34. Mr. Fleming again appealed. His appeal bond was secured by a bank letter of credit in the amount of $233,000.00.

On January 24, 1986, the Supreme Court of Virginia denied Mr. Fleming's third petition for appeal.[2] On January 29, 1986, prior to expiration of the time allowed under that Court's Rules for a motion for rehearing, respondent Gibson obtained payment of the $233,000 letter of credit posted by Mr. Fleming to secure his appeal bond. As described in the opinions of the District Court, App. at A-7 to A-11, A-40 to A-42, the other respondents allegedly played various roles in that event.[3]

Mr. Fleming thereafter filed with the Supreme Court of Virginia a motion for an order that the $233,000 be returned to the bank until final disposition of his appeal, and that Mr. Fleming's appeal bond and letter of credit be returned to the Clerk of that Court. The motion was granted on February 19, 1986, and the Court's order was satisfied on February 25, 1986.[4]

On March 13, 1986, 22 days after the Supreme Court of Virginia ordered the defendants to un-do the events of January 29 and 16 days after they complied, Mr. Fleming filed this case in the District Court under 42 U.S.C. §§ 1981, 1983, 1985 and 1986. He

---

[2] *Fleming v. Moore*, Record No. 850622 (Va. 1986) (unpublished), *cert. denied*, ____ U.S. ____, No. 85-2168 (Oct. 14, 1986).

[3] Respondents Marshall and Buriak are State officers and employees, a Circuit Court Clerk and a Supreme Court Deputy Clerk, respectively. They are alleged to have participated in a civil conspiracy with Mr. Gibson and the other respondents, who are not public officers or employees. The conspiracy allegation sustains petitioner's obligation of pleading action under color of law for purposes of § 1983. *See Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980).

[4] Mr. Fleming also moved for a rehearing of his petition for appeal, which was denied on March 7, 1986. A subsequent petition for certiorari was denied on October 14, 1986, and rehearing was denied on December 8, 1986. *Fleming v. Moore*, ____ U.S. ____, ____, No. 85-2168. The judgment now is final and has been enforced, including payment under the letter of credit. The United States District Court for the Western District of Virginia (Hon. James C. Turk), Judge H. Emory Widener, Jr. of the Court of Appeals for the Fourth Circuit, and Chief Justice Rehnquist and Justice Marshall all have refused to enjoin enforcement of the judgment. If there otherwise were any merit in the Petition, mootness might well preclude a decision of the merits.

alleged that the defendants had conspired against him on account of racial discrimination, and he contended that defendants' conduct violated his rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. He acknowledged that the proceeds of the letter of credit were returned to the bank, but he sought compensatory and punitive damages for his alleged emotional distress, lost business opportunities, and attorneys' fees incurred in the 21 days between payment of the letter of credit and the order that its proceeds be returned.

SUMMARY OF ARGUMENT

The Petition for Certiorari presents no question worthy of this Court's attention. The judgments of the courts below are manifestly correct, and petitioner has presented no conflict between the decision below and any other appellate decision.

ARGUMENT

The question presented is whether a State denies Due Process where it provides a sufficient pre-deprivation procedure,[5] allegedly ignored pursuant to a conspiracy among state actors and others; and where the State thereafter provides for return of the property at issue through prompt and effective post-deprivation proceedings. Under well established law, there is no Due Process violation in those circumstances. *See Parratt v. Taylor*, 451 U.S. 527, 535-44 (1981); *Hudson v. Palmer*, 468 U.S. 517, 530-34 (1984).

Petitioner asserts that the decisions below are in conflict with *Augustine v. Doe*, 740 F.2d 322 (5th Cir. 1984), *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), and *Stana v. School District*, 775 F.2d 122 (3d Cir. 1985). *See* Petition for Cert. at 15-

---

[5] *See* Petition for Cert. at 7, 18, 19, 23; App. at A-54.

20. None of the asserted conflicts is real; all of the decisions at issue, including the decisions below, are entirely consistent with *Parratt* and *Hudson* and with each other.[6]

Petitioner's principal argument, as far as it can be determined (*cf.* Supreme Court Rule 21.5), appears to go to the lower court's application of the settled rule that "random and unauthorized" acts of state actors do not deny Due Process, where it would be impracticable for the State to provide a predeprivation remedy but a meaningful post-deprivation remedy is available. *See Hudson, Logan,* and *Parratt, supra;* Petition for Cert. at i, 16-18. As an issue of application of a settled legal precept, not of choice or even interpretation of the applicable rule, this issue does not merit this Court's attention.

If petitioner's argument were considered, it would have quickly to be rejected. As the courts below recognized, the alleged civil conspiracy between state and private actors was the "random and unauthorized" act of the individuals, allegedly in violation of State statute and policy, and not the act of the State itself. App. at A-25, A-26; *see Hudson,* 468 U.S., at 534, *quoted in part* in Petition for Cert. at 23. Just as in *Parratt,* the property deprivation at issue allegedly resulted from "the unauthorized failure of agents of the State fo follow established state procedure." 451 U.S., at 543. "[W]hen deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur." *Hudson,* 468 U.S., at 533.

Petitioner seems to argue that respondents' actions could not have been "random" or "unauthorized" because they were "intentional." *See* Petition for Cert. at 23. However "intentional" respondents' actions may have been, under petitioner's own theory of the case they were unauthorized by the State and not the intentional acts of the State. *See id.* at 4, 23. In *Hudson* the Court specifically extended the rule of *Parratt* to "an unauthorized intentional deprivation of property by a state employee." 468 U.S., at 533. "The state can no more anticipate and control in

---

[6] *Augustine* involved an alleged Fourth Amendment violation and a deprivation of liberty as well as property, presenting issues not presented in the *Parratt* line of cases or in this case.

advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." *Id.*

Petitioner also appears to suggest that his postdeprivation state remedy does not satisfy Due Process because it allegedly did not "make him whole." Petition for Cert. at 20. This Court held in *Parratt*, however, that state remedies that may not provide all the relief which might have been available under § 1983 nevertheless may satisfy the requirements of Due Process. 451 U.S., at 544. In *Parratt* the available state remedies "could have fully compensated the respondent for the property loss he suffered," and therefore they were held sufficient to satisfy Due Process. *Id.* Here the available state remedy actually led to restoration of the property at issue, and the same conclusion necessarily follows. Moreover, the state remedy here was speedy and effective, and not "lengthy [or] speculative" as in *Logan*. 455 U.S., at 437.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

M. E. GIBSON, JR., et al.

By _____
Counsel of Record

James C. Roberts*
Russell V. Palmore, Jr.
George A. Somerville
MAYS & VALENTINE
Post Office Box 1122
Richmond, Virginia 23208
(804) 697-1200

Albert M. Orgain, IV
Henry M. Massie, Jr.
Robert B. Delano, Jr.
SANDS, ANDERSON,
MARKS & MILLER
The Ross Building, Suite 1440
801 East Main Street
Richmond, Virginia 23219
(804) 648-1636

Mary Sue Terry
Attorney General of Virginia

Guy W. Horsley, Jr.
Senior Assistant Attorney
General

OFFICE OF THE
ATTORNEY GENERAL
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-2071

Counsel of Record for Respondents

APPENDIX

Fleming v. Gibson, et al.
Record No. 86-1717
United States Court of Appeals
for the Fourth Circuit
(Order Dated 21 September 1987)

It is ORDERED that appellant's motion to file his petition for rehearing en banc out of time shall be, and it hereby is, granted.

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Phillips and Judge Sprouse.

/s/ H. E. Widener, Jr.

For the Court